No. 89-738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AGIPCOAL USA, INC.,

Petitioner,

v.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA; DISTRICT 30, UNITED MINE WORKERS OF AMERICA; LOCAL UNION NO. 1827, UNITED MINE WORKERS OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

ROBERT H. STROPP, JR.
EARL V. BROWN, JR.*
MICHAEL DINNERSTEIN
900 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 842-7357

* Counsel of Record

Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

The Respondents, the United Mine Workers of America, its District 30 and its Local Union No. 1827, do not agree with Petitioner's statement of the questions presented. Properly, the sole question presented is as follows:

> Did the Court of Appeals correctly apply this Court's settled standard for judicial review of labor arbitration awards to an arbitrator's routine determination that a grievance involved a continuing violation of the collective bargaining agreement?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-738

AGIPCOAL USA, INC.,

Petitioner,

v.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA; DISTRICT 30, UNITED MINE WORKERS OF AMERICA; LOCAL UNION NO. 1827, UNITED MINE WORKERS OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

The Respondents, the International Union, United Mine Workers of America, the United Mine Workers of America, District 30, and United Mine Workers of America Local Union No. 1827 (hereinafter collectively "the Union"), submit that the petition for a writ of certiorari to review the order entered by the United States Court of Appeals for the Sixth Circuit in this case on June 21, 1989 should be denied. The Union concurs with Petitioner's discussion of the *Opinions Below*, *Jurisdiction*, and the *Statute Involved*.

COUNTERSTATEMENT OF THE CASE

This case concerns the timeliness of a grievance filed under a collective bargaining agreement. The controversy centers, as the decision below puts it, on the arbitrator's use of the ". . . 'continuing violation' concept that is well established in both arbitral and judicial precedents" in his determination that the grievance was timely. (App. 4a).

In 1984, the petitioner, Agipcoal, USA Inc. ("Agipcoal"), and the Union signed a comprehensive labor agreement, the 1984 National Bituminous Coal Wage Agreement ("NBCWA"), covering Agipcoal's coal mining operations on coal-bearing lands known as the "Pevler Complex." (App. 10a, 17a). In that agreement, Agipcoal and the Union broadly agreed to resolve their differences within the grievance and arbitration procedure. The agreement set a 10-day 'statute of limitations' for filing grievances. (App. 2a-3a; 12a).

In order to limit the loss of work opportunities that invariably results when collective bargaining unit work is subcontracted, the NBCWA restricted Agipcoal's ability to enter into mining agreements with independent contractors to mine the employer's coal. One such provision, Article IA(h)(1), read:

> "The Employers agree that they will not lease, sublease or license out any coal lands, coal producing or coal preparation facilities where the purpose thereof is to avoid the application of this Agreement or any section, paragraph or clause thereof." (App. 10a-11a, n.2).

Shortly after signing the NBCWA in 1984, Agipcoal shut down its own mining operations at the Pevler Complex, and laid off its collective bargaining unit members. (App. 2a, 17a). In May and July, 1986, however, Agipcoal entered into long-term mining agreements with two subcontractors to mine Agipcoal's coal at the Pevler Com-

plex. (App. 2a, 19a). As classic subcontracting agreements, both mining contracts required that the subcontractors deliver all of the Pevler coal to Agipcoal, and prohibited them from selling coal independently. Agipcoal, in turn, met its sales commitments with the coal mined on Agipcoal's land by the subcontractors. (App. 2a, 19a, 32-33a).

The employees of the subcontractors worked under labor standards inferior to those established in the NBCWA. (App. 23a, n.3, 39a). By subcontracting the mining of its coal, Agipcoal was able to avoid the comparatively higher labor costs imposed by the NBCWA, and fill its orders with cheaper coal. (App. 40a). This substitution diminished the work opportunities of Agipcoal's own employees. (*Id.*).

Although the Union became aware of this subcontracting in August and December, 1986, no grievance was filed. In December, 1986, however, a coal miner filed a grievance challenging the subcontracts under Art. IA(h)(1) and this litigation was launched.

Before the arbitrator, Agipcoal naturally sought to defeat the grievance on timeliness grounds. Agipcoal supported its argument with precedent consisting of arbitration awards issued under the NBCWA. (App. 25a-26a). The Union countered that the subcontracts constituted ongoing violations of the collective bargaining agreement due to their continuing substitution of the subcontractors' employees for Agipcoal's employees in the mining of Agipcoal's coal. Accordingly, the Union argued that the grievance was timely even if grieved more than ten days after the onset of the violation. The Union supported its position with NBCWA arbitration precedent endorsing the "continuing violation" concept under the contractual 10-day limitations period. (App. 22a).

In a careful decision parsing these facts and precedents, the arbitrator mutually selected by Agipcoal and the

Union concluded that the grievance was a timely challenge on the "continuing violation" theory:

> "The contract violation alleged by the present . . . grievance is not a discrete, one-time occurrence (like a discharge or the awarding of a contract to repair a piece of equipment to an outside firm). Rather, that alleged violation continues every day Highwire, Inc. and KTK, Inc. mine coal at the Pevler Complex . . . . Thus, if the Company's disputed actions were determined to actually be in violation of the 1984 National Agreement the scenario would be one of a [prototypical] continuing violation." (App. 31a).

The arbitrator hinged his ruling on the particular facts of the subcontracts, and the purpose of Art. IA(h)(1), recognizing that such subcontracting harms the coal miners in the collective bargaining unit continuously by depriving them of work as long as the subcontractors' employees, rather than Agipcoal's miners, except Agipcoal's coal. (App. 36a).[1]

After disposing of the "statute of limitations" issue, the arbitrator resolved the merits of the grievance in the Union's favor, and directed prospective termination of the subcontracting arrangements. The arbitrator awarded no back pay. (App. 3a).

Having argued and lost before the arbitrator it selected, Agipcoal repaired to the United States District Court for the Eastern District of Kentucky for another bite at the decisional apple. The decision below recounts those proceedings:

---

[1] The arbitrator viewed Art. IA(h)(1) as designed to prevent Agipcoal ". . . from utilizing the leasing or licensing out of its coal lands as a vehicle . . . [for] . . . shifting the work . . . [collective bargaining unit members] . . . normally perform . . ." to employees with lesser labor standards. (App. 36a). Such work preservation provisions have been approved by this Court. *National Woodwork Mfrs. Assoc. v. NLRB*, 386 U.S. 612, 642-643 (1967).

"A magistrate recommended that the award be vacated because the arbitrator had 'ignored the plain language' of the agreement:

> 'Since the record contains no evidence indicating that these parties intended to depart from the clear language of the agreement, the undersigned is of the opinion that the arbitrator's decision conflicts with the express terms of the agreement and cannot be rationally deduced from the agreement. The arbitrator has ignored the plain language of the agreement and has dispensed his own industrial justice.'

The district court accepted the magistrate's recommendation and entered an order vacating the award." (App. 3a).

The Court of Appeals reversed, invoking this Court's recently affirmed and long-settled standard of deference to labor arbitration awards:

> "The arbitrator in the present case was, in our opinion, 'arguably' construing and applying the contract. *The arbitrator did not ignore the 10-day provision of the bargaining agreement, but attempted to apply it in conjunction with a 'continuing violation' concept that is well established in both arbitral and judicial precedents.*" (App. 4a) (Emph. suppl.).

REASONS FOR DENYING THE WRIT

I. The Decision Below, Upholding A Routine Labor Arbitration Award, Presents No Conflict With This Court's Decisions Nor Any Important Question Of Federal Law To Be Settled

The decision of the Court of Appeal implicates none of the considerations favoring grant of the writ of certiorari articulated by this Court's Rule 17. Rather, the decision below is a routine application of this Court's long-settled and recently affirmed standard of deference to labor arbitration awards. The Court of Appeals correctly deferred

to the arbitrator's determination that particular subcontracts, in the context of the facts before him, constituted "continuing violations" of a collective bargaining agreement. *Paperworkers v. Misco*, 484 U.S. 29 (1987); *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (*"The Steelworkers Trilogy"*).

The procedural issue at hand—whether an alleged violation of a collective bargaining agreement should be deemed "continuing"—is grist for the arbitral mill.[2] Like judges, labor arbitrators routinely view limitations periods through the prism of the violation alleged and apply the "continuing violation" concept to numerically fixed limitations periods. The leading treatise on labor arbitration states:

> "Many arbitrators have held that 'continuing' violations of the agreement (as opposed to a single isolated and completed transaction) give rise to 'continuing' grievances in the sense that the act complained of may be said to be repeated from day to day—*each day there is a new 'occurrence'*; these arbitrators have permitted the filing of such grievances at any time, *this not being deemed a violation of the specific time limits stated in the agreement* (although any back pay ordinarily runs only from the date of filing)." Elkouri and Elkouri, *How Arbitration Works*, 4th ed., 1985, 197; *see also, Steelworkers Handbook On Arbitration*, 1970 ed., 285 (Emph. suppl.).

Here, the arbitrator merely relied upon arbitral precedent under the very agreement involved, the NBCWA,

---

[2] Despite intimations to the contrary by Petitioner, Petition, pps. 10-11, subcontracting questions are also "grist in the mills of the arbitrators." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584 (1960).

to relate the contractual limitations period to the nature of the alleged contractual violation. (App. 30a-32a). In so doing, the arbitrator necessarily analyzed (1) the purpose of Art. IA(h)(1), (2) the factual nature of the particular subcontracts, whether discrete or on-going, (3) the economic considerations underlying the employer's decision to subcontract, and (4) the effect of that decision on the work opportunities of the employer's coal miners. (App. 36a). In *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557, a case involving the timeliness of a grievance under the "continuing violation" theory, this Court approved the very methodology employed in this arbitration.

That the arbitrator properly looked to NBCWA arbitral precedent for guidance in applying the limitations period is hardly subject to dispute. This Court has long endorsed "the common law of the shop" as an essential element in the arbitrator's decisional process:

> ". . . the governmental nature of the collective-bargaining process demand[s] a common law of the shop which implements and furnishes the context of the agreement."
>
> • • • •
>
> "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally part of the collective bargaining agreement although not expressed in it."

Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580, 581-582 (1960).

The clear upshot is that an arbitrator's reading of a collective bargaining agreement text by reference to arbitral case law cannot be defeated by rote invocation of the "plain meaning" rule. Plainly, a numerical limitations period must be applied to the particular facts of the case to determine exactly when the grievance accrued. This process necessarily involves consideration of

the factual context, and interpretation of those provisions of the agreement implicated in the merits of the alleged contract breach—the "intertwined issues of 'substance' and 'procedure.'" *John Wiley & Sons v. Livingston*, 376 U.S. at 556-558. If the "plain meaning" rule were deemed to preclude such an analysis, then there could never be an implied concept of "continuing contract violations." But there is, as the common law of this very industry establishes.

The arbitrator's procedural decision in this case was fraught with subsidiary factual and analytical determinations. By properly going beyond the text of the 10-day rule to consideration of the facts, and the contractual theories raised on the merits, the arbitrator entered the terrain of interpretation and application of the agreement. Doubts about the arbitrator's application of arbitral case law doctrine in a fact-intensive dispute involving complex subcontracting issues are no basis for vacating the award. As this Court recently affirmed:

> "Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts . . . [A]s long as the arbitrator is even *arguably* construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Paperworkers v. Misco*, *supra* at 38. (Emph. suppl.)

The court below properly declined Agipcoal's invitation that it sit to sort out the applicability of myriad arbitral precedent under the NBCWA to this case. In declining that debilitating invitation, the Court of Appeals not only cited but correctly applied this Court's standard of review:

> "The arbitrator in the present case was, in our opinion, '*arguably*' construing and applying the contract. The arbitrator did not ignore the 10-day provision

> of the bargaining agreement, but attempted to apply it in conjunction with a 'continuing violation' concept that is well-established in both arbitral and judicial precedents." (App. 4a). (Emph. suppl.)

Whatever error may infect the arbitrator's decision, it should not be disturbed merely because it applied "well-established" arbitral precedents in a way thought to be mistaken. This Court, and other federal courts, do not sit as NBCWA arbitration appeals boards.

II. This "Particularistic" Application Of A General Rule, "Turning On Special States Of Fact", Presents No Circuit Conflict

This Court does not sit to resolve:

> ". . . hosts of particularistic applications of general rules turning upon the analysis of special states of fact." Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1933*, 48 Harv.L.Rev. 238, 268-269 (1934).

Not only did the Court of Appeals correctly apply this Court's standard of deference to the labor arbitration at hand, it did so without any conflict with the decisions of other courts of appeals. Those decisions uniformly exhibit deference to the procedural rulings of labor arbitrators. *Rochester Telephone Corp. v. Communication Workers*, 340 F.2d 237 (2d Cir. 1965); *Carey v. General Electric Company*, 315 F.2d 499 (2d Cir. 1963), *cert. denied*, 377 U.S. 908 (1964); *Chauffeurs, Teamsters & Helpers v. Stroehmann Bros.*, 625 F.2d 1092 (3rd Cir. 1980); *Radio Corp. of America v. Association of Pro. Eng. Personnel*, 291 F.2d 105 (3rd Cir. 1961), *cert. denied*, 368 U.S. 898 (1961); *International Telephone & Telegraph Corp. v. Local 400, etc.*, 286 F.2d 329 (3rd Cir. 1960); *Tobacco Workers v. Lorillard Corp.*, 448 F.2d 949 (4th Cir. 1971); *Local 4-447 v. Chevron Chemical Co.*, 815 F.2d 338 (5th Cir. 1987); *Local No. 406, International Union of Oper. Eng. v. Austin Co.*, 784 F.2d 1262 (5th

Cir. 1986); *Palestine Telephone Co. v. Local 1506, IBEW*, 379 F.2d 234 (5th Cir. 1967); *Beer, et al., Local 774 v. Metropolitan Distributors*, 763 F.2d 300 (7th Cir. 1985); *Local 81, American Federation of Tech. Eng. v. Western Elec. Co., Inc.*, 508 F.2d 106 (7th Cir. 1974); *Auto., Pet. & Allied Indus. v. Town & Country Ford*, 709 F.2d 509 (8th Cir. 1983); *Local 198, United Rubber Workers v. Interco, Inc.*, 415 F.2d 1208 (8th Cir. 1969); *Bevington & Basile Wholesalers v. Local U. No. 46*, 330 F.2d 202 (8th Cir. 1964); *Hosp. & Inst. Workers v. Marshall Hale Mem. Hosp.*, 647 F.2d 38 (9th Cir. 1981); *Bealmer v. Texaco, Inc.*, 427 F.2d 885 (9th Cir. 1970), *cert. denied*, 400 U.S. 926 (1970).

Petitioner's theory of circuit conflict, Petition, pp. 11-12, is that any time a court of appeals enforces an arbitration award despite a litigant's invocation of the plain meaning rule, there exists a conflict with those appellate decisions vacating awards upon the strength of the plain meaning doctrine. Application of the *Steelworkers Trilogy, supra*, and *Misco, supra*, to the welter of arbitration cases will necessarily result in differing outcomes in particular cases. Collective bargaining agreements vary, as do the facts and arbitral rationales. This Court should not involve itself in reviewing such "particularistic applications of general rules." Frankfurter & Hart, *supra*.

CONCLUSION

The Court of Appeals correctly applied this Court's policy of deference to labor arbitration in this case. Its decision conforms to the appellate case law. There is no reason for granting the writ.[3]

Respectfully submitted,

ROBERT H. STROPP, JR.
EARL V. BROWN, JR.*
MICHAEL DINNERSTEIN
900 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 842-7357
Attorneys for Respondents

* Counsel of Record

[3] Petitioner's claim that the federal labor policy of speedy dispute resolution is a basis for grant of the writ is wholly make-weight. Petition, pp. 9-11. The federal policy of deference to the parties' own contractual ordering counsels that the interpretation of their mutually selected arbitrator be upheld.